liberal use, of epithets does not constitute argument. Of course a corporation is useful to those who control it, — it acts "for" its stockholders. Now if one legal unit acts "for" a second legal unit, the second legal unit is usually liable for the act of the first unit; the importance of the corporate franchise lies precisely in the fact that, although the corporation acts "for" its stockholders, its stockholders are not liable for its acts. If this distinction is not kept bright, but is clouded by the use of double-meaning words, the law of corporation will lose much, if not most, of its usefulness. The legislative grant of the privilege to control a legal unit, but to be unburdened by the liabilities of that unit, is a matter of substance, and not of mere form.

In the principal case, the bondholders were content in the reorganization to take the bonds of the coal company. They recognized the railway company as a distinct legal unit, and the trustee for the bondholders contracted with the railway company for the payment, not of the bonds in their entirety, but of a fund which it was expected would discharge the prior obligations and provide something toward the payment of the bonds. The bondholders later contended successfully that the railway company was under an implied liability to supply cars, so that the expected fund should be forthcoming. The action of the bondholders in seeking to treat the bonds themselves as the obligations of the railway company was inconsistent both with the bargain made in the reorganization and also with the relief obtained against the railway company in the prior phases of the litigation.

In *Marsch* v. *Southern N. E. R. Corp.*[4] the plaintiff sought to hold the Grand Trunk Railway Company of Canada liable for the breach of a contract which the plaintiff had made with the Southern New England Railroad Corporation, practically all of the stock of which was owned by the first corporation, on the ground that the second corporation, being so controlled, was but the "alter ego" of the first corporation. The Massachusetts court denied, with fitting brevity, the right of the plaintiff to subject the first corporation to liability on this ground.

RATE STATUTE — CHANGE OF DECISION — RIGHT OF CARRIER TO RECOVER EXCESS VALUE OF SERVICES. — A statute prescribing a schedule of maximum rates to be charged for hauling lignite coal was passed in 1907 by the legislature of North Dakota. The carriers declined to comply with it: but their violation was successfully enjoined.[1] On supersedeas the statutory rate did not go into operation until March, 1910, when the Supreme Court of the United States affirmed the decision below. The case was later reopened in accordance with the terms of the Supreme Court's decree "without prejudice." The North Dakota court again held the rates to be reasonable,[2] but on appeal

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[4] 120 N. E. 120 (1918).

[1] North Dakota *ex rel.* McCue *v.* Northern Pacific Ry. Co., 19 N. D. 45, 120 N. W. 869, 216 U. S. 579.

[2] North Dakota *ex rel.* McCue *v.* Northern Pacific Ry. Co., 26 N. D. 438, 145 N. W. 135.

the Supreme Court held them to be confiscatory.[3] One of the carriers then brought action against a shipper for the difference between the rate prescribed by the statute and a reasonable rate. And the North Dakota court has recently held that it is not entitled to recover.[4] The carrier, of course, had contended that the rates had always been unreasonable; that therefore it had, during the period covered by the statutory rates, been serving the shipper at an unjust and illegal compensation; that to the extent of the excess of value of service over prescribed rate, it under mistake or duress had given value in return for no consideration; in short, that the shipper was unjustly enriched at its expense. On the other hand, the reasoning of the court is that there was no contract, express or implied in fact, on the part of the shipper to refund in case the Supreme Court later found the rates to be confiscatory; that so far as recovery was to be based upon unjust enrichment, the situation of the carrier was similar to that of the plaintiff in *Windbiel* v. *Carroll*.[5] There the plaintiff paid the defendant's claim insisting that he did not owe it, and later found a receipt conclusively showing that his belief was correct; yet he was unable to recover. The court distinguished between payment in ignorance of a fact and payment in ignorance of the means of proving a fact. If a plaintiff cannot produce the requisite proof of what he knows to be true, the law will not aid him. This principle, generally regarded as settled,[6] may conceivably, however, not extend to the principal case, where the only way of ascertaining the facts of a complicated situation is by a period of experimentation. The North Dakota court further found that, so far as the Supreme Court had in the past interpreted the decree, "without prejudice," that decree provided for future conditions that might arise and did not permit overthrowing what was already concluded.

It is commonly stated that money paid under a mistake of law cannot be recovered. If this principle were sound, it would be a strong argument in favor of the North Dakota decision. It is not the present purpose to discuss the correctness of this doctrine, which has been attacked by text-writers,[7] is not accepted in all jurisdictions,[8] and is subject to so many exceptions as to create a doubt as to its existence.[9] Irrespective of its soundness the principal case may be supported. In *Henderson* v. *Folkstone Waterworks Co.*,[10] the plaintiff paid a water tax which had been held to be legal. Later the House of Lords held the

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[3] 236 U. S. 585.

[4] Minneapolis & St. P. & S. S. M. Ry. Co. *v.* Washburn L. C. Co. (N. D.) 168 N. W. 684.

[5] 16 Hun (N. Y.), 101.

[6] WOODWARD, QUASI CONTRACTS, § 13; KEENER, QUASI CONTRACTS, 27.

[7] WOODWARD, QUASI CONTRACTS, § 36; KEENER, QUASI CONTRACTS, 85–95; Stadden, "Error of Law," 7 COL. L. REV. 476; 2 POMEROY, EQ. JUR., §§ 841–51.

[8] Northrop *v.* Graves, 19 Conn. 548; Scott *v.* Board of Trustees, 132 Ky. 616, 116 S. W. 788.

[9] Erkens *v.* Nicolin, 39 Minn. 461, 40 N. W. 567; Varnum *v.* Highgate, 65 Vt. 416, 26 Atl. 628; Marcotte *v.* Allen, 91 Me. 74; 39 Atl. 346, County of Wayne *v.* Reynolds, 126 Mich. 231, 85 N. W. 574; Haven *v.* Foster, 9 Pick. (Mass.) 112 (1829). *In re* Ainsworth, [1915] 2 Ch. 96; Culbreath *v.* Culbreath, 7 Ga. 64.

[10] 1 T. L. R. 329 (1885).

tax illegal; yet the plaintiff was unable to recover. Lord Coleridge said: "Here at the time the money was paid, which was before Dobbs's case, the law was in favor of the company, and there was no authority to show that it could be recovered back on account of a judicial decision reversing the former understanding of the law." The case has been followed in the United States,[11] though there are opinions to the contrary.[12] The true theory of such cases is not that decisions of the courts are evidence of the law, that the earlier decision is merely a poor exposition of the rule, that the law was always in accordance with the later judgment, and that money paid under mistake of law is lost to the payer; but that decisions of the courts make the law,[13] that the payment was in truth a legal payment at the time it was made, and, there being no mistake, it cannot be recovered. The view of the analytical jurists, that the judges make the law, has as much application where a court has vacillated in considering the constitutionality of a statute, as where it has changed its mind on a principle of the common law.[14] Nor can the carrier claim that it rendered the services under duress and that value so given without consideration may be recovered. For, if the duress is according to law at the time exercised, the defendant can stand on his legal rights then acquired, although the highest court later sees fit to change the rule for the future.

It is true that the decree of the Supreme Court of the United States under which the North Dakota carriers rendered the statutory services was peculiar in that it contained the provision "without prejudice." The court's own opinion of the nature of this decree, however, seems to be that it is final as to transactions between it and any subsequent decree prescribing a different rule. Whether the object of the reservation is — as ordinarily — to give the carrier or the state, as the case may be, an opportunity to demonstrate by actual practice a question difficult of proof without experiment,[15] or to leave a loophole for change of circumstances,[16] the Supreme Court has felt this qualification "not to leave open the controversy as to the period with which the decree dealt and which it concluded."[17]

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[11] Metzger *v.* Greiner, 9 Ohio C. Ct. R. (N. S.) 364; Kenyon *v.* Welty, 20 Cal. 637. And see Hardigree *v.* Mitchum, 51 Ala. 151; Pittsburgh Co. *v.* Lake Co., 118 Mich. 109, 76 N. W. 395; Lejon *v.* Richmond, 2 Johns. Ch. (N. Y.) 51; Harris *v.* Jex, 55 N. Y. 421 (1874).

[12] Centre School Township *v.* State, 150 Ind. 168, 49 N. E. 961.

[13] GRAY, NATURE AND SOURCES OF THE LAW, §§ 465–512, 535–50; 2 AUSTIN, JUR., 4 ed., 655; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175; Kuhn *v.* Fairmont Coal Co., 215 U. S. 349. For the view that judicial decisions are merely evidence of preëxisting law see 1 BLACKSTONE, COMMENTARIES, 68–71, 4 ILL. L. REV. 533; Swift *v.* Tyson, 16 Pet. (U. S.) 1.

[14] Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175.

[15] Knoxville *v.* Water Co., 212 U. S. 1, 19; Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 54, 55; Northern Pacific Ry. *v.* North Dakota, 216 U. S. 579, 581; Louisville *v.* Cumberland Tel. & Tel. Co., 225 U. S. 430, 436; Des Moines Gas Co. *v.* Des Moines, 238 U. S. 153, 173.

[16] Minnesota Rate Cases, 230 U. S. 352, 473.

[17] Missouri *v.* C. B. & Q. R. R., 241 U. S. 533, 541. Here statutory rates had been enjoined by the United States Circuit Court. On appeal to the Supreme Court the injunction was dissolved without prejudice. The state then brought original action in the Supreme Court for excess fares paid by the officers. The carrier again at-

On the whole, then, the recent North Dakota decision seems sound. The result in this instance throws the expense of the experiment on the carrier. But it is not the first time the carrier has been so burdened.[18] And, had the earlier decision declared the rates unconstitutional and the later declared them fair, the principle could have been invoked by the carrier to throw laboratory expenses upon the state.

RECENT CASES

ANIMALS — TRESPASS ON LAND — DAMAGES. — Defendant's sheep trespassed on plaintiff's land and while wrongfully there developed scab, in consequence of which they were detained two and a half months in a barn and meadow on plaintiff's land under the provisions of a statute. Plaintiff's sheep which had been in contact with the trespassing sheep were also detained. There was no evidence that defendant knew the sheep were diseased. *Held*, distinguishing *Cox* v. *Burbidge*, 13 C. B. N. S. 430 and *Cooke* v. *Waring*, 2 H. & C. 232, that plaintiff might recover as damages for the trespass the keep of the sheep, depreciation of plaintiff's sheep, expense of dipping the sheep, and loss of profits. *Theyer* v. *Purnell*, [1918] 2 K. B. 333.

For discussion of this case, see NOTES, page 420.

ASSIGNMENTS — PRIORITIES — TRUSTS — RULE IN *DEARLE* VERSUS *HALL* NOT APPLICABLE IN DETERMINING PRIORITY BETWEEN *CESTUI QUE TRUST* AND SUBSEQUENT ASSIGNEE. — Solicitors executed a declaration of trust in favor of defendant in respect of a mortgage debt secured by a deed upon a reversionary interest in a share of personalty settled by a will. In breach of trust the solicitors purported to assign the same interest to the plaintiff, a *bonâ fide* purchaser. The plaintiff gave notice to the trustees under the will, and, having received possession of the title deeds, claims priority over defendant who had not given notice of his interest. *Held*, that the *cestui que trust* prevails, the rule in *Dearle* v. *Hall* having no application to a beneficiary under a declaration of trust. *Hill* v. *Peters*, [1918] 2 Ch. 273.

In England and in some American jurisdictions the obligee of a legal debt cannot transfer it to a *bonâ fide* purchaser free of latent equities. *Penn* v. *Browne*, Freem. C. 214; *In re European Bank*, L. R. 5 Ch. App. 358; *Bush* v. *Lathrop*, 22 N. Y. 535. *Contra*, *Murray* v. *Lylburn*, 2 Johns. Ch. (N. Y.) 441; *Winter* v. *Montgomery Gas-Light Co.*, 89 Ala. 544, 7 So. 773. By the weight of authority the assignee of an equitable interest likewise takes subject to all equities; and this is held even by courts which reject the rule in regard to legal obligations. *Clouette* v. *Story*, [1911] 1 Ch. 18; *Henry* v. *Black*, 213 Pa. 620, 63 Atl. 250. The principal case presents the question whether the fact that the assignee has given notice to the trustee or obligor, the *cestui que trust* not having done so, gives him priority in spite of the above rule. Where the question is between successive assignees for value in good faith, England and a number of American jurisdictions hold that the first to give notice prevails. *Dearle* v. *Hall*, 3 Russ. Ch. 1; *Jenkinson* v. *N. Y. Finance Co.*, 79 N. J. Eq. 247, 82 Atl. 36. *Contra*, *West Texas Lumber Co.* v. *Green County*, 188 S. W. 283 (Tex. Civ. App.). This rule rests upon the analogy to the duty of a vendee of chattels to take possession in order to make his title indefeasible. See *In re Phillips' Estate*, 205 Pa. 515, 522, 55 Atl. 213, 215. See also 25

tempted to show the rates confiscatory; but on motion this defense was stricken out. The court declined to pass in advance on the main question in the case.

[18] Compare the Adamson Law. Wilson *v.* New, 243 U. S. 332.